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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-305

ANGELO F. CONIGLIO, *Petitioner*

v.

HIGHWOOD SERVICES, INC., *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Apart from a short discussion of the questions presented by the Petition (Br. in Opp. 6-9), the Brief in Opposition[1] is devoted to two collateral arguments: (1) that further review is foreclosed because three other courts of appeals "have reached the same result" as that below, with a denial of certiorari in one case (Br. in Opp. 1-2), and (2) that the judgment should stand for reasons that the court of appeals expressly rejected (Br. in Opp. 10-17).

[1] Respondents National Football League and Pete Rozelle have filed no brief in opposition, apparently relying upon the brief of Respondent Highwood Services, Inc.

No reply is needed with respect to the single point on which the court of appeals justified summary judgment. The Petition amply shows the need for this Court's plenary consideration of the proposition that the antitrust laws prohibit only a subspecies of "restraint of trade or commerce" involving restraint of competition and thus do not touch direct restraints upon the consumer's own participation in "trade or commerce."[2] It is only Respondents' collateral arguments – their invocation of the decisions of other courts relating to football tickets and their reliance upon arguments rejected below – that require brief reply.

1. The Brief in Opposition correctly states that three other courts of appeals and a number of district courts have upheld summary judgments for defendants in football ticket tying cases. It further correctly states that they have done so on three different theories: the "no

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[2]We note only the error of Respondents' reliance upon several cases that the court of appeals did not cite in support of its affirmance. Neither *Champion Oil Serv. Co. v. Sinclair Ref. Co.*, 1974-2 Trade Cases ¶75,217 (6 Cir. 1974), nor *Cartrade, Inc. v. Ford Dealers Adv. Assn.*, 446 F.2d 289 (9 Cir. 1971), involved either an alleged tying arrangement or even an alleged *per se* violation; they held only that there is no violation of the rule of reason without proof that the challanged arrangement was "designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade" (1974-2 Trade Cases at p. 97,485). That unexceptionable principle bears no relationship to Respondents' proposition that only an injury to "competition" can be a "restraint of trade."

Shayne v. Madison Square Garden Corp., 1974 Trade Cases ¶74,920 (EDNY 1973), held only that a class action was improper with respect to a complex variety of ticket-sale plans, and the *obiter* discussion there of the law of tying arrangements was substantially discounted by the court of appeals below (Pet. App. 9a). There is no question here of the propriety of the district court's class determination in this case (see 60 F.R.D. 359 (1972) and Pet. 4 n.2).

anti-competitive effect" theory articulated below, the "same product" theory,[3] and the "no coercion" theory.[4] What Respondents fail to point out is the inconsistency of the various lower courts in selecting among the various possible theories and the general paucity of analysis supporting their decisions. Thus, for example, the district court opinion in *Laing v. Minnesota Vikings Football Club, Inc.*, 1973-2 Trade Cases ¶74,601 (D. Minn. 1973), granted summary judgment on a "no coercion" theory; its brief opinion cited no authority other than the even briefer opinions in two prior football ticket cases. The Eighth Circuit affirmed in *Laing* with a majority opinion relying on the district court opinion and stating – without elaboration – the further "ground that there is no anti-competitive effect." 492 F.2d 1381 (8 Cir. 1974). In contrast, the opinion below expressly rejected the "no coercion" theory. *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5 Cir. 1974), essentially adopted the Second Circuit's opinion, and the recent affirmance in *Grossman Development Co. v. Detroit Lions, Inc.*, 6 Cir. No. 74-1093, Sept. 5, 1974, was without published opinion.

With the principal exception of the opinion below, the lower court decisions show not a reasoned consensus

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[3] This theory, which Respondents assert as an alternative justification for the judgment below (Br. in Opp. 13-17), contends that there can be no tying arrangement since regular game tickets and exhibition game tickets are not separate and distinct products. The court of appeals rejected this theory as a basis for summary judgment below (Pet. App. 8a-9a).

[4] This theory, which Respondents assert as still another alternative justification (Br. in Opp. 10-13), contends that season tickets do not qualify as a coercive tying product because tickets to individual games can be bought separately. This theory was also rejected below (Pet. App. 6a-8a).

but, at the most, a common antipathy to the difficult questions raised by the ticket tying cases. Only in this case have those questions been given the analysis they deserve and – as the Petition shows – the results of that analysis expose a question of basic antitrust law that requires this Court's plenary consideration. That question is important not only for football fans – who will properly find it anomalous that the rule established below denies Buffalo fans a protection that San Francisco fans are given[5] – but for the interests of consumers in general. The appropriateness of further review is unaffected by the recent denial of the writ in *Laing* (No. 73-1716, October 15, 1974), where the issue was not presented with clarity either in the Eighth Circuit's decision or in the petition.

2. The need for further review is emphasized by Respondents' evident lack of confidence in the court of appeals' *ratio decedendi*. It is significant that they reassert at length the "no coercion" and "same product" theories notwithstanding the reasoned conclusion below that material issues of fact preclude summary judgment with respect to both coercive effect and product separability (see Pet. 4-5, 6a-9a). We need not discuss these issues in the present context, since Respondents' arguments *against* the holding below should not be accepted by this Court without plenary consideration.

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[5] As noted in the Petition (at 10 n.5), Judge Sweigert denied summary judgment for defendants in *Flood v. San Francisco Forty-Niners*, N.D. Cal. No. C72 1704 (July 9, 1974), agreeing with the Second Circuit's analysis but finding an issue as to anti-competitive effect because of the factual circumstance that the Oakland Raiders play in close geographic proximity to the Forty-Niners.

CONCLUSION

The principal question raised by the Petition is set in stark relief by Respondents' argument that the claim is defeated because "there is no interchangeable product which the buyer Coniglio has been prevented from obtaining***" (Br. in Opp. 9). If it is an unlawful restraint of trade to impede a consumer's choice between two interchangeable products, why is it not equally an unlawful restraint of trade to impede his choice not to purchase at all? If so, the court of appeals has misapprehended a fundamental antitrust principle, and this Court should correct it. [6]

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] Respondents have made no substantial response to the Petition's second point – that the court of appeals improperly precluded proof of actual anti-competitive effects in the entertainment market even if injury to competition were required. See Pet. 11-12.